Sound One Corporation *and* Motion Picture Studio Mechanics, Local 52, International Alliance of Theatrical Stage Employees, AFL–CIO and Union Local 306, Motion Picture Projectionists, Video Technicians and Allied Crafts, International Alliance of Theatrical Stage Employees, AFL–CIO, Party to the Contract. Cases 2–CA–25528, 2–CA–25656, and 2–CA–26121

June 14, 1995

DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND TRUESDALE

On February 7, 1995, Administrative Law Judge D. Barry Morris issued the attached decision. The General Counsel and Charging Party filed briefs supporting the judge's decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief. The General Counsel and Charging Party filed cross-exceptions and supporting briefs, and the Respondent filed a brief in opposition to the cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order, as modified.[2]

The judge found that the Respondent did not violate Section 8(a)(5) and (1) by refusing to bargain with Motion Picture Studio Mechanics, Local 52, International Alliance of Theatrical Stage Employees, AFL–CIO (Local 52) until it withdrew its unfair labor practice charges against the Respondent. Without resolving whether the Respondent's vice president, Birnbaum, stated on December 30, 1991, that the Respondent would not negotiate until the charges were dropped—which statement Birnbaum denied—the judge concluded that because negotiations began in April 1992 without the charges being withdrawn, the General Counsel failed to establish by a preponderance of the evidence that the Respondent had unlawfully refused to negotiate. The General Counsel and Charging Party except, claiming that the Respondent unlawfully refused to negotiate during the 4 months between Birnbaum's statement and the onset of bargaining.

We agree with the judge that the Respondent did not violate Section 8(a)(5) as alleged. Even assuming that Birnbaum stated that the Respondent would not bargain until Local 52 withdrew its charges, the evidence does not establish that the Respondent delayed negotiations because of the charges. Indeed, on April 2, 1992, the Respondent wrote Local 52 accusing *it* of making little effort to ''find an opportune time for us to sit down to discuss the new contract.'' In these circumstances, we agree with the judge that the General Counsel failed to establish that the Respondent unlawfully conditioned bargaining on Local 52's withdrawal of its charges or unlawfully delayed bargaining because of the charges.

Finally, we adopt the judge's finding that the Respondent did not unlawfully insist as a condition of reaching agreement that maintenance employees be removed from the Local 52 bargaining unit. Based on the negotiations cited by the judge, as well as the June 26, 1992 bargaining session and the Respondent's September 23 and October 8, 1992 letters to the Union, we find that the evidence does not establish that the Respondent insisted as a condition of reaching agreement that maintenance employees be excluded from the unit.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Sound One Corporation, New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

''(a) Threatening its employees with discharge and other unspecified reprisals and discharging its employees for activities protected by Section 7 of the Act.''

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

---

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d. Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In sec. II,A,3, of his decision, the judge stated that the Respondent's general manager, Koch, informed Tejral of his layoff on December 10, 1991. Koch, however, notified Tejral of his layoff on January 22, 1992. We correct the judge's inadvertent error and find that it does not affect our decision.

[2] The Order and notice have been modified to conform to the judge's findings.

Contrary to the General Counsel's request, we do not find that a broad cease-and-desist order is warranted in this case. See *Hickmott Foods*, 242 NLRB 1357 (1979).

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten our employees with discharge or other unspecified reprisals or discharge our employees for activities protected under Section 7 of the Act.

WE WILL NOT recognize or bargain with Union Local 306, Motion Picture Projectionists, Video Technicians and Allied Crafts, International Alliance of Theatrical Stage Employees, AFL–CIO (Local 306) as the exclusive collective-bargaining representative of the employees described below, unless and until Local 306 has been certified by the National Labor Relations Board as the exclusive bargaining representative of any such employees in an appropriate bargaining unit. The employees are, as follows:

> All of our employees not now members of an IATSE Local who are working on, are capable of or are authorized to work on an interchangeable basis on the following functions: projection, dubbers, transfers, machine room operators as beginners, apprentices or full scale journeymen (collectively known as post production technicians).

WE WILL NOT give effect to the recognition agreement and collective-bargaining agreement entered into by us and Local 306 on August 21, 1991.

WE WILL NOT support and assist Local 306 or any other labor organization by soliciting employees to join, or distributing applications to join any such labor organization, conducting meetings on company premises in support of such labor organizations and paying employees for time spent and providing food and beverages at such meetings.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights under Section 7 of the Act.

WE WILL offer James Marchione immediate and full reinstatement to his former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority rights and privileges, and make Marchione and Andrew Tejral whole for any loss of earnings, with interest.

WE WILL remove from our files any reference to the discharge and layoff of Marchione and Tejral, respectively, and notify them in writing that this has been done and that the discharge and layoff, respectively, will not be used against them in any way.

WE WILL withdraw and withhold all recognition from Local 306 as the representative of the employees described above unless and until it has been certified by the National Labor Relations Board as the exclusive representative of any such employees.

SOUND ONE CORPORATION

Burt Pearlstone, Esq., for the General Counsel.
Perry Heidecker, Esq. (Marshall M. Miller Associates), of Lake Success, New York, for the Respondent.
Nicholas F. Lewis, Esq. and *Lauren Esposito, Esq. (Lewis, Greenwald, Kennedy, Lewis, Clifton & Schwartz, P.C.)*, of New York, New York, for Local 52.
Jesse Strauss, Esq. (Reitman Parsonet), of Newark, New Jersey, for Local 306.

DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge. This case was heard before me in New York City during 16 days of hearing commencing December 6, 1993, and ending June 15, 1994. Upon several charges, the first of which was filed on January 15, 1992, a consolidated complaint was issued on April 2, 1993, alleging that Sound One Corporation (Respondent) violated Section 8(a)(1), (2), (3), and (5) of the National Labor Relations Act (the Act). Respondent filed an answer denying the commission of the alleged unfair labor practices.

The parties were given full opportunity to participate, to produce evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs were filed by the parties on August 29, 1994.

On the entire record of the case, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New York corporation with an office and place of business in New York City, has been engaged in providing postproduction services to the film industry. Annually Respondent provides services valued in excess of $50,000 at its facility for firms located outside the State of New York. Respondent admits, and I so find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. In addition, it has been admitted, and I find, that Motion Picture Studio Mechanics, Local 52, International Alliance of Theatrical Stage Employees, AFL–CIO (Local 52) and Union Local 306, Motion Picture Projectionists, Video Technicians and Allied Crafts, International Alliance of Theatrical Stage Employees, AFL–CIO (Local 306) are labor organizations within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

1. Recognition and support of Local 306

Respondent has been engaged in providing postproduction services to the film industry for over 20 years. On August 21, 1991,[1] Respondent signed a recognition agreement with Local 306 covering Respondent's machine room operators, effective from September 1 through December 31, 1996. Sean Squires was employed at Respondent from August 1988 to June 1992 as a machine room operator. He appeared to me to be a credible witness. He credibly testified that during the week of November 4, Jeremy Koch, Respondent's vice president and general manager, told him that Koch had signed an agreement with Local 306 and ''they were forcing him to hire all union employees.'' Koch further told Squires that ''he had no choice and that I had to sign with Local 306 in order for him to continue to employ me.'' Koch showed him a document entitled, ''Memorandum of Agreement'' between Sound One and Local 306 and handed Squires a Local 306 authorization card. Squires then spoke to other members of the machine room staff and they agreed to meet the following week. The machine room operators met on November 12 at which time they agreed to draft a letter to Koch requesting a meeting to discuss their dissatisfaction with the Local 306 agreement. On November 18, the machine room staff met with Koch. William Nisselson, studio manager, was also present. Nisselson stated that he was ''surprised'' that the machine room operators were unhappy with the Local 306 agreement and told the employees that they could have their own copy of the agreement once they ''signed with Local 306.''

On November 22, Squires was talking to several other employees about Local 52 and Squires mentioned that he thought the Local 52 agreement was better than the Local 306 agreement. At that time Elisha Birnbaum, vice president of Respondent, appeared. Squires credibly testified that Birnbaum said ''Local 52 was a weak union and that they couldn't do anything to help us.'' Birnbaum continued ''that he thought that Doug Murray was the leader of the opposition of the employees to management and that Doug had stabbed him in the back.'' On the same day Peter Riley, machine room supervisor, handed Squires and Murray envelopes containing Local 306 applications. Squires and Murray refused to sign the applications. Squires then contacted the Local 52 office and asked whether he was required to sign a Local 306 application. After being told that he was not required to sign, Squires gave that information to James Marchione, another machine room operator. During the week of November 18, Squires joined Local 52. Around the same time Marchione, Murray, and two other machine room operators, Harry Higgins and Andrew Tejral, also joined Local 52.

On December 4, Respondent distributed a memorandum to the machine room staff advising them that Steve D'Inzillo, a representative of Local 306, had requested a meeting with the employees in Koch's office. The meeting was scheduled for December 5. The memorandum informed the employees that overtime would be paid and that a sandwich platter and sodas would be available during the meeting. Squires credibly testified that at the meeting D'Inzillo stated that ''certain pricks had gone to Local 52 and were causing trouble.'' Several of the employees asked questions about the pay scale in the Memorandum of Agreement and ''Mr. D'Inzillo crossed out certain of the wages and increased them by $50.''

2. Discharge of Marchione

Marchione began his employment with Respondent on March 3, 1989. From the fall of 1989 until his discharge he was a machine room operator. On November 22, Riley left an application for Local 306 on Marchione's desk and told him that it had to be signed before the meeting that evening with D'Inzillo. Marchione did not sign the application. Later that day Marchione told other machine room operators that they were not required to sign the Local 306 application. Riley then asked Marchione if ''I knew what I was doing'' and Marchione replied ''the International's now involved.'' Riley then said ''something to the effect of it's your career.'' Later that evening, as Marchione was preparing to leave the facility, Riley told him that ''there was a meeting upstairs to which I was expected to attend, with Steve D'Inzillo of Local 306.'' Marchione replied, ''I know about the meeting and I'm not going.'' At that point Marchione left the facility.

During the week of November 25, Nisselson told Marchione that he wanted to talk with him. Marchione went to Nisselson's office and Nisselson told him ''you know Sound One is going union and that you'll be required to join Local 306 or else you won't be permitted to work here.'' Marchione told Nisselson that ''I wasn't planning on joining.'' The following week, again in Nisselson's office, Nisselson reminded Marchione that D'Inzillo had requested a meeting with the machine room staff and told Marchione that ''you and this cabal are making a big mistake with this lawyer thing and in the end it's not going to matter anyway.''

On December 1, Nisselson telephoned Marchione at home and told him that he had accrued many weeks of vacation and that he was required to take it ''effective immediately.'' Marchione told Nisselson that it was unfair to require him to take the vacation on such short notice and Nisselson replied that he could start the vacation beginning December 9. Marchione was accustomed to working out at a gym which was down the street from the facility and he kept his gym clothes in the machine room. On December 12, while Marchione was on vacation, he came into the machine room and changed his clothes. At the time, Ulysses Rivers, another machine room operator, was in the room. On December 13, Riley telephoned Marchione at home and told him that there had been a complaint. Marchione replied, ''what the f____ are you talking about?'' Riley said that Rivers complained that Marchione had ''stripped in front of him.'' Marchione replied ''he's full of shit. I was changing into my gym clothes. And that I had done so many times before.'' After some additional conversation Marchione told Riley ''asshole, bother me about this when I come back.'' On December 23, Marchione asked Riley about his Christmas bonus. Riley replied that Respondent had sent him a letter and that ''I'll need your keys.'' Marchione credibly testified that the next day Birnbaum told him ''I believe that you're telling the truth about the events that took place'' when he changed into his gym clothes. Birnbaum continued to say that Marchione

[1] All dates refer to 1991 unless otherwise specified.

''had angered a lot of people by my actions on November 22 and that was the reason why I was terminated.''

3. Layoff of Tejral

Tejral began his employment with Respondent in July 1987. From the fall of 1987 until his termination he was a machine room operator. On November 22, Riley handed Tejral a Local 306 application. Later in the day, when Riley came to pick up the application, he noticed that Tejral had not signed it, at which point Riley told Tejral ''I hope you know what you are doing.'' Tejral had already signed an application for Local 52 on November 21 and was sworn in on December 10. Tejral credibly testified that on December 10, Melvin Zelniker, Respondent's chief engineer, had a conversation with Tejral in which he expressed his concern ''that I had not signed Local 306 application for membership [and] that he would hate to see something happen to me because I didn't sign the application for 306.'' At 5 p.m. that same day Tejral was called to Koch's office. Koch told Tejral ''I'm sorry, but we are going to have to lay you off.'' Koch said that ''business was declining'' and that there was ''nothing wrong with my work.'' Tejral was offered reinstatement on February 1, 1993.[2]

4. Maintenance classification

Respondent's written proposal for a successor agreement excluded the classification of maintenance men although this classification was in the expired agreement. At the first bargaining session held on April 26, 1992, Respondent's representative said that the classification was eliminated because the maintenance men had never been in the Union. At the session on June 26, 1992, the Local 52 representative asked whether Respondent had changed its mind about maintenance men. Koch replied ''we were waiting for you, we have a whole set of proposals, we were waiting for you to respond to it.'' At the next negotiating session which took place on August 21, 1992, there was no discussion of the maintenance classification. On October 8, 1992, Lawrence Milman, counsel for Respondent, wrote to Edward Quinlan, counsel for Local 52, that he believed that the negotiations were stalemated and that ''the company will be implementing the terms and conditions contained in its last contract proposal.'' The final negotiating session took place on November 19, 1992. Again, there was no discussion of the maintenance classification.

B. *Discussion and Conclusions*

1. Threats and interrogation

The complaint alleges that Respondent threatened employees with discharge if they did not support Local 306 and it interrogated employees about their union activities. I credit the testimony of Squires, Marchione, and Tejral, which was largely corroborated by Koch, that in early November Koch called them into his office one by one. Koch showed each of the machine room operators a copy of the collective-bargaining agreement with Local 306 which had been signed on their behalf and a ''collective-bargaining authorization.'' Koch told the employees that they had to ''sign with Local 306 in order for him to continue'' to employ them. I find that such conduct constitutes unlawful solicitation and a threat to discharge employees in violation of Section 8(a)(1) and (2) of the Act. See *Jayar Metal Corp*., 297 NLRB 603, 608 (1990); *Montfort of Colorado*, 256 NLRB 612 (1981), affd. 683 F.2d 305 (9th Cir. 1982). During the week of November 11, the machine room operators sent Koch a letter requesting a meeting to discuss their concerns. Koch asked several of the employees if they knew about the letter and asked Marchione if he was doing this ''of your own free will.'' After Marchione replied in the affirmative, Koch said ''that means I can hold you completely responsible.'' I find this constituted a threat of reprisal if Marchione continued to oppose Local 306, in violation of Section 8(a)(1) of the Act.[3] See *Tubari Ltd*., 287 NLRB 1273, 1281 (1988). In addition, Squires credibly testified that on November 22 while he was having a conversation with several employees, Birnbaum came up to him and said ''Local 52 was a weak union and that they couldn't do anything to help us.'' Birnbaum continued to say that ''he thought that Doug Murray was the leader of the opposition of the employees to management and that Doug had stabbed him in the back.'' I find this statement to be a threat in violation of Section 8(a)(1) of the Act.

2. Discharge of Marchione

After the machine room staff sent a letter to Koch requesting a meeting to discuss their concerns with Local 306, on November 14 Koch questioned Marchione whether the letter requesting the meeting was of Marchione's ''own free will.'' After Marchione answered in the affirmative Koch told him ''that means I can hold you completely responsible.'' On November 22, Marchione refused to sign the Local 306 application and made it clear that he would not attend the meeting with D'Inzillo. Local 52's initial unfair labor practice charge was filed on November 25. On December 5, Nisselson told Marchione ''you and this cabal are making a big mistake with this lawyer thing.'' Indeed, I have credited Marchione's testimony that subsequent to his termination, Birnbaum told him that he had ''angered a lot of people by my actions on November 22 and that was the reason why I was terminated.''

Under *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989

[2] Citing pp. 1586–1587 of the transcript, Respondent's brief maintains that Koch offered Tejral reinstatement on December 1, 1992. Koch testified that on December 1 he told Tejral ''I wanted to bring you back.'' This did not constitute a valid offer of employment. It is well-settled that ''an offer of employment must be specific, uniquivocal, and unconditional in order to toll backpay and satisfy a respondent's remedial obligation.'' *Holo-Krome Co*., 302 NLRB 452, 454 (1991).

[3] Under all the circumstances, I do not believe that Koch's question to Marchione if he was doing this ''of your own free will'' constitutes unlawful interrogation. See *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 706 F.2d 1006 (9th Cir. 1985). In addition, General Counsel maintains that Koch asked Marchione if he could hold him responsible, and this constituted unlawful interrogation. The record, however, does not show the statement to be a question. Instead, Marchione testified that Koch told him ''that means I can hold you completely responsible'' (Tr. 203). Rather than unlawful interrogation, I have found this statement to be a threat of reprisal. Accordingly, the allegation that Respondent engaged in unlawful interrogation is dismissed.

(1982), the Board requires that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision. Once this is established the burden shifts to the employer to demonstrate that the ''same action would have taken place even in the absence of the protected conduct.'' Marchione was terminated on December 19 just several weeks after he refused to sign the Local 306 application and refused to attend the meeting with D'Inzillo. Two weeks earlier Nisselson had told him that he and ''this cabal are making a big mistake.'' In fact, after the termination, Birnbaum told him that he had ''angered a lot of people'' by his actions on November 22 and that was the reason why he was terminated. I find that General Counsel has made a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in Respondent's decision to terminate Marchione.

Respondent contends that Marchione was discharged because he changed clothes in front of another employee and because of his language to his supervisor in a phone conversation the day after the incident. Marchione's gym was near the facility and Marchione credibly testified that for approximately a year-and-a-half prior to the discharge, Marchione would regularly change into his gym clothes at the facility approximately three times a week. He was never warned about doing that or told not to do it. When Riley called him the day after the incident Marchione stated that ''I was pretty mad and I said, asshole bother me about this when I come back'' from vacation. The record is replete with testimony that profanity was commonly used at the facility. Squires credibly testified that he told his supervisor, Riley, ''f__ you,'' and was not disciplined for that. I find Respondent's reasons for the termination to be pretextual. See *Limestone Apparel Corp*., 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982); *Arthur Young & Co*., 291 NLRB 39 (1988).

Riley testified that he had problems with Marchione going back a year-and-a-half prior to his termination. The problems consisted of lateness, absences, and insubordination. Riley testified that for a long period of time Marchione was ''really abusive'' he would ''tell me go f__ myself.'' Similarly, Zelniker testified that Marchione was unsatisfactory from the time he began his employment with Respondent. Yet, it was not until soon after Marchione refused to sign the application for Local 306 and refused to attend the meeting with D'Inzillo that he was terminated. I find that Respondent has not satisfied its burden under *Wright Line*, supra, of demonstrating that the ''same action would have taken place even in the absence of the protected conducted.'' Accordingly, Respondent's termination of Marchione violated the Act.

3. Layoff of Tejral

On November 22, Tejral refused to sign the Local 306 application given to him by Riley. The day before, Tejral had signed an application with Local 52. Riley admitted that prior to Tejral's layoff he was aware that Tejral had not signed with Local 306. In addition, Local 52 sent a letter to Birnbaum on December 30 listing five persons who were admitted into membership in Local 52. The list included Tejral's name. I have credited Tejral's testimony that in December Zelniker expressed his concern that Tejral had not signed the Local 306 application and told him that ''he would hate to see something happen to me because I didn't sign the application for 306.'' Based on the above, I find that under *Wright Line*, supra, General Counsel has made a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in Respondent's decision to lay off Tejral.

Respondent contends that Tejral was laid off pursuant to a plan to lay off several employees because of a slowdown in business. I credit Riley's testimony that beginning in the fall of 1991 there was a decrease in work at Respondent because of a producer boycott of New York City filmmaking. Nisselson and Koch corroborated this testimony. With respect to why Tejral was selected for layoff, however, Respondent offers conflicting reasons. Thus, Riley testified that while Tejral was a ''good and efficient'' worker he recommended Tejral's layoff because Tejral had been telling him that he wanted to get into a different area of the film business, namely video. Similarly, Koch testified that Tejral was laid off because he had an ''attitudinal problem'' and that he was saying he ''didn't want to be there.'' Yet, Nisselson testified that among the reasons why Tejral was selected for layoff was that he ''wasn't exceptional'' and that he was ''grim.'' When asked whether the fact that Tejral was not ''interested in working in a machine room in Sound One for a long time'' was a factor in Nisselson's decision to lay off Tejral, Nisselson replied ''no, not at all.'' The Board has long expressed the view that ''when an employer vacillates in offering a rational and consistent account of its actions, an inference may be drawn that the real reason for its conduct is not among those asserted.'' *Aluminum Technical Extrusions*, 274 NLRB 1414, 1418 (1985); *F. W. I. L. Lundy Bros. Restaurant*, 248 NLRB 415, 428 (1980). Such an inference is warranted here. I find that Respondent has not satisfied its burden under *Wright Line*, supra, of demonstrating that the layoff of Tejral ''would have taken place even in the absence of the protected conduct.'' Accordingly, I find that Respondent's layoff of Tejral on January 22, 1992, violated the Act.

4. Support and recognition of Local 306

The complaint alleges that Respondent rendered assistance to Local 306 and granted recognition to, and entered into a collective-bargaining agreement with, Local 306 notwithstanding that it did not represent an uncoerced majority of the unit employees. In early November 1991, Koch personally distributed collective-bargaining authorizations on behalf of Local 306 to the machine room operators. He told the employees that they ''had to sign with Local 306 in order for him to continue to employ'' them. It is well established that an employer violates Section 8(a)(1) and (2) of the Act by soliciting its employees to sign authorization cards on behalf of the Union. See *Shenandoah Coal Co*., 305 NLRB 1071, 1072–1073 (1992); *Famous Castings Corp*., 301 NLRB 404, 407 (1991). Similarly Riley's solicitation of the machine room staff to sign Local 306 union applications on November 22, 1991, constitutes unlawful assistance in violation of Section 8(a)(1) and (2) of the Act.[4]

[4] In addition, on March 2, 1992, Respondent distributed letters from D'Inzillo to Squires, Higgins, and Murray. These letters, which were sent by interoffice mail or hand-delivered by Riley, advised the

Respondent sponsored two meetings on its premises on November 22 and December 5, 1991, where D'Inzillo met with the machine room operators. Both meetings took place in Koch's office, they were announced by memos from management, management provided food and beverages free of charge and employees attending were paid by Respondent for the time spent at the meetings. These actions constituted assistance and support of Local 306 in violation of Section 8(a)(1) and (2) of the Act. See *Safeway Stores*, 276 NLRB 944 fn. 2 (1985); *Famous Castings Corp*., supra, 301 NLRB at 406–407; *Kosher Plaza Supermarkets*, 313 NLRB 74, 85 (1993).

Respondent recognized Local 306 as the exclusive bargaining representative of the unit of machine room operators at a time when Local 306 did not have the support of a majority of the unit. The record establishes that there were 11 machine room operators employed by Respondent during the months of August, September, and October 1991.[5] Of these 11, I credit the testimony of the 6 employees who testified that they did not authorize any Union to represent them prior to the time in which Koch told them that if they did not sign they would face discharge. The record indicates that Kerry Kelly never signed an authorization for Local 306. Thus, the record establishes that at least 7 of the 11 machine room operators did not support Local 306 at the time of the recognition in late 1991. Thus, Respondent recognized Local 306 as the exclusive bargaining representative of its machine room operators at a time when the Union did not represent a majority of the employees in that unit in violation of Section 8(a)(1) and (2) of the Act. See *Ladies Garment Workers v. NLRB*, 366 U.S. 731 (1961); *Jayar Metal Corp*., supra, 297 NLRB at 608. In addition, the collective-bargaining agreement entered into by Respondent with Local 306 contains a union-security provision requiring covered employees to join and remain members of Local 306 in order to retain their jobs. It is well-settled Board law that such conduct violates the Act, even if the union-security provision is never enforced. See *American Tempering, Inc*., 296 NLRB 699, 707 (1989).

5. Refusal to meet

The complaint alleges that Respondent refused to meet with Local 52 for purposes of bargaining collectively for a successor agreement unless the Union withdrew its unfair labor practice charges. Robert Reilly and Frank Schulz, representatives of Local 52, testified that on December 30 Birnbaum told them that ''he would not negotiate with us until we dropped our NLRB charges.'' Birnbaum denied that he made such a statement. In fact, negotiations began without the charges having been withdrawn. I find that General Counsel has not shown by a preponderance of the evidence that Respondent refused to meet with Local 52 unless it withdrew its unfair labor practice charges. Accordingly, the allegation is dismissed.

6. Maintenance men classification

The complaint alleges that Respondent insisted as a condition of reaching any collective-bargaining agreement that Local 52 agree to a contract proposal which removed maintenance men from the existing unit. The first negotiation session was held on April 26, 1992. Respondent's initial set of proposals deleted any mention of the maintenance employees. Quinlan, Local 52's representative, mentioned that maintenance men were not in the proposal. Milman, Respondent's representative, replied that maintenance men had never been in the Union and he would like the contract to ''represent reality.'' Koch credibly testified that Quinlan asked whether Respondent was refusing to bargain regarding the maintenance men. Koch replied ''we are not refusing to bargain about it, we would like them out, but we have got a lot of issues on the table.'' Quinlan then said ''we can't go any further, that will be all. You will be hearing from us.'' At the meetings held on August 21 and November 19, 1992, there were no discussions of the maintenance classification. There were no further meetings after the November 1992 meeting. I find that General Counsel has not shown by a preponderance of the evidence that Respondent insisted, as a condition of reaching a collective-bargaining agreement, that Local 52 agree to a contract proposal which removed maintenance men from the existing unit. Accordingly, the allegation is dismissed.

CONCLUSIONS OF LAW

1. The Respondent, Sound One Corporation, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 52 and Local 306 are labor organizations within the meaning of Section 2(5) of the Act.

3. By threatening employees with discharge if they engage in protected activities, Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

4. By discharging James Marchione and by laying off Andrew Tejral for their union activities, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

5. By rendering assistance and support to Local 306, Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (2) of the Act.

6. By granting recognition to and entering into a collective-bargaining agreement with Local 306, notwithstanding that Local 306 did not represent a majority of the unit, Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (2) of the Act.

7. The aforesaid unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

8. Respondent did not violate the Act in any other manner alleged in the complaint.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find it necessary to order Respondent

---

recipients that unless they applied to join Local 306 by March 23, 1992, ''this union will have no alternative but to require your employer to discharge you . . . .'' I find that Respondent's distribution of these letter constituted unlawful assistance, in violation of Sec. 8(a)(1) and (2) of the Act.

[5] These included James Marchione, Andrew Tejral, Sean Squires, Douglas Murray, Harry Higgins, Terrance Laudermilch, Robert Johanson, Ulysses Rivers, Roberto Fernandez, Paul Coburn, and Kerry Kelly.

to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent having discharged James Marchione and having laid off Andrew Tejral in violation of the Act, I find it necessary to order Respondent to offer Marchione full reinstatement to his former position,[6] or if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make whole Marchione and Tejral for any loss of earnings that they may have suffered from the time of their respective discharge and layoff to the dates of Respondent's offers of reinstatement. Backpay shall be computed in accordance with the formula approved in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[7] In addition, Respondent having rendered unlawful assistance to Local 306, Respondent must cease recognizing and bargaining with it.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The Respondent, Sound One Corporation, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees with discharge and discharging its employees for activities protected by Section 7 of the Act.

(b) Recognizing or bargaining with Local 306 as the exclusive collective-bargaining representative of the employees described below unless and until Local 306 has been certified by the National Labor Relations Board as the exclusive bargaining representative of any such employees in an appropriate bargaining unit. These employees are, as follows:

> All of Respondent's employees not now members of an IATSE Local who are working on, are capable of or are authorized to work on an interchangeable basis on the following function: projection, dubbers, transfers, machine room operators as beginners, apprentices or full scale journeymen (collectively known as post production technicians).

(c) Giving effect to the recognition agreement and collective-bargaining agreement entered into by Respondent and Local 306 on August 21, 1991.

(d) Supporting and assisting Local 306 or any other labor organization by soliciting employees to join, or distributing applications to join any such labor organization, conducting meetings on company premises in support of such labor organization and paying employees for time spent in providing food and beverages at such meetings.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer James Marchione immediate and full reinstatement to his former position, or if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges and make Marchione and Andrew Tejral whole for any loss of earnings, with interest, in the manner set forth in the remedy section above.

(b) Remove from its files any reference to the unlawful discharge and layoff of Marchione and Tejral, respectively, and notify them in writing that this has been done and that the discharge and layoff, respectively, will not be used against them in any way.

(c) Withdraw and withhold all recognition from Local 306 as the representative of the employees described above unless and until it has been certified by the National Labor Relations Board as the exclusive representative of any such employees.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying all payroll records, social security payment records, timecards, personnel records and reports and all other records necessary to analyze the amounts owing under the terms of this Order.

(e) Post at its facility in New York, New York, copies of the attached notice marked ''Appendix.''[9] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that those allegations as to which no violations have been found are dismissed.

---

[6] Tejral had been offered reinstatement on February 1, 1993.

[7] Under *New Horizons*, interest is computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C § 6621.

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''